



**THE ATTORNEY GENERAL
OF TEXAS**

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AUSTIN, TEXAS 78711

July 1, 1969

Honorable Robert S. Calvert
Comptroller of Public Accounts
State Capitol Building
Austin, Texas

Opinion No. M-424

Re: Whether penalties for
late payment of taxes
should be assessed when
the check in payment of
taxes is dishonored by
the drawee bank through
no fault of the taxpayer.

Dear Mr. Calvert:

Your opinion request reads, in part, as follows:

"Two banks, each in a different city in this State, have recently had occasion to freeze the accounts of some or all of their depositors. This became necessary, in each case, due to difficulties not involving the depositors in question, and the accounts were rendered frozen suddenly, without warning or notice being given to these depositors.

"Prior to the action by the banks, several depositors placed in the U. S. Post Office quarterly sales tax reports and enclosed therewith checks drawn upon their accounts with one of the above banks in payment of the tax due as reported.

"Following timely receipt by this office of the quarterly reports and checks, one of the above banks, upon presentment, failed and refused to accept the checks, and the same were dishonored, with the explanation that the depositor's account would be frozen for a time due to bank difficulties of an internal nature.

"It is expected that the same situation will occur with regard to the second bank. Correspondence from the bank and two depositors leads us to this conclusion.

* * *

"Your official opinion is requested as to whether the statutory penalty for late payment, under Article 20.05(H), supra, must be assessed the taxpayer whose check was not honored by his bank when presented by this office."

By supplemental letter you have also advised us:

"In regard to the recent request for an opinion concerning the return of checks written in payment of sales taxes, please be advised that such request was made based upon our assuming that the checks in question were executed prior to the depositor's knowledge of his account being frozen, and that at the time the checks were executed there was sufficient funds on deposit with the bank to cover the same and at the time of presentment by this office to the bank there still remained sufficient funds to pay the checks."

For purposes of this opinion we are assuming as true the same facts that you have assumed as true.

It is the opinion of this office that under the facts submitted no penalty should be assessed for late payment, provided that the checks are paid within a reasonable time after being dishonored, or the taxpayers make actual payment in money, either with or without use of the checks in question, within a reasonable time after notification that the checks have been dishonored.

The backdrop for this opinion is the well-settled rule that penalties and forfeitures are to be strictly construed against the State, and that doubts or ambiguities in this field will be resolved against the State by the courts. It has also been held that a penalty will not be inflicted where the failure is occasioned by circumstances beyond the control of the party or where the particular event causing the failure could not reasonably have been foreseen and guarded against. See 45 Tex.Jur.2d 5, Penalties, § 3; Hedgepeth v. Hamilton Warehouse Company, 104 Tex. 496, 140 S.W. 1084 (1911); Whitfield v. Terrell Compress Company, 62 S.W. 116 (Tex.Civ. App. 1901, error ref.); Conley v. Sherman S. & S. R. Company,

90 Tex. 295, 38 S.W. 519 (1897); Bloom v. Texas State Board of Pharmacy, 390 S.W.2d 252 (Tex.Sup. 1965); and Chesapeake and Ohio Railway Company v. Board, 100 W.Va. 222, 130 S.E. 524 (1925). The last cited case holds that where failure of performance was caused by the intervention of a vis major or Act of God, a recovery for penalty will be denied.

The leading case on this subject is Muldrow v. Texas Frozen Foods, 299 S.W.2d 275 (Tex.Sup. 1957). There, the court held that a check for taxes delivered to the collecting official on the last day allowed for payment and thereafter returned unpaid by the drawee bank does not constitute a timely payment of taxes, even though the check was dishonored solely because of a mistake on the part of the bank and was paid when presented a second time. The court held that under our Constitution and statutes payment of taxes must be in money and that no official can obligate the State to accept a check as either absolute or conditional payment. Since a check cannot be accepted as conditional payment of taxes, the court rejected the general doctrine of relation which is that when a check is accepted as conditional payment and the condition is satisfied when the check is paid, it is proper to treat the payment as having been made at the time the check was received. However, the court further held that if a check is given for purposes of paying taxes and is promptly paid when first presented in due course to the drawee bank, then for all practical purposes the funds are as readily available to the taxing authority as if payment had been made in money, and that, therefore, such a check would be the legal equivalent of money and the taxes would be considered as paid when the check was received by the collecting official. Thus, although a check can never constitute payment or conditional payment of taxes, the court nevertheless approved a limited form of the "relation back" doctrine, limited to checks paid when first presented in due course. The Muldrow case is in any event distinguishable from the situation here presented wherein apparently neither the taxpayer nor his agent, the bank, is at fault, and payment was delayed due to circumstances beyond his control.

In 1961, after the Muldrow decision, the Legislature enacted Article 1.13, Title 122A, Taxation-General, Vernon's Civil Statutes, and it was amended in 1967. The 1961

enactment was in substance what is now Section (a) of Article 1.13. Then in 1967, Sections (b) through (g) were added. It will be noted that Section (c) is not limited to the provisions relating to the time a report is placed in the United States mail. Section (c) deals with standards of care required of a taxpayer in making timely payments and with situations where payments will be deemed to have been timely filed. Therefore, the holding in Muldrow must now be interpreted and applied in the light of such statute.

Article 1.13 (a) and (c) are as follows:

"(a) Any report, required by any provision of this Title to be filed or made on or before a specific date shall be deemed timely filed if said report, shall be placed in the United State Post Office or in the hands of a common or contract carrier properly addressed to the Comptroller of Public Accounts on or before the date required for such payment, report, annual report, return, declaration, statement, or document to be filed or made.

* * *

"(c) The person making the report shall be deemed to have substantially complied with the filing requirements as to timeliness if he exercised reasonable diligence to comply and through no fault of his own the reports were not timely filed."

Section (f) of Article 1.13 provides that:

"The term 'report' shall include any payment, report, annual report, return, declaration, statement or other document required by any provision of this Title to be filed with the Comptroller."

Therefore, the word "payment" can properly be substituted for the word "report" in Section (c), making it read as follows:

(c) The person making the "payment" shall be deemed to have substantially complied with

the filing requirements as to timeliness if he exercised reasonable diligence to comply and through no fault of his own the "payments" were not timely filed.

We do not view Article 1.13 as altering the mode of paying taxes; however, because payment is computed from the time provided for filing of the tax reports, a substantial compliance rule for reports logically governs in connection with the time determinative for payment. The delivery of money continues to be the only method of effecting payment of taxes. It follows that the "in fact" time of payment is always when money is delivered, never before. However, Article 1.13 altered the rule as to when payment shall be deemed as having been timely made insofar as penalty assessments are concerned only. The question of timeliness now depends on the degree of diligence exercised by the taxpayer and the presence or absence of fault on his part.

Under the Muldrow decision if the money is readily available to the taxing authority, then the time of payment should be related to the time of the receipt of the check by the taxing authority. Our interpretation of Muldrow in the light of Article 1.13 is that if the taxpayer has used reasonable diligence to make the funds timely and readily available, and if they are unavailable through no fault of his, then the eventual payment of the check within a reasonable time is related to the time the Comptroller receives the check.

We cannot accept the concept that reasonable diligence as to timely payment can only be exhibited by the timely delivery of money or by the timely delivery of a check which is paid when first presented in due course.

If actual payment in money, either by use of the check or otherwise, is not received within a reasonable time after the taxpayer is notified that the check has been dishonored, then the taxpayer will not have exercised reasonable diligence so as to excuse an untimely payment, and the time of actual payment cannot be deemed to relate to any previous time.

Our interpretation necessarily involves fact questions dealing with reasonable diligence, taxpayer's fault, and reasonable time. These fact questions must first be determined

by the Comptroller and finally by the courts in the event of a dispute between the taxpayer and the Comptroller.

In many cases the issues of reasonable diligence, fault and reasonable time will be matters about which reasonable minds can differ, depending on the facts of the particular case. However, in our opinion, the facts stated in your request reveal reasonable diligence and lack of fault on the part of the taxpayers to the time of the dishonoring of the checks, as a matter of law. The fact question of whether such payment in money is actually made within a reasonable time is open and must be determined as stated above.

We conclude that, under the facts stated in your request, if the checks in question are paid within a reasonable time after they were first dishonored by the bank or if payment in money is otherwise made by the taxpayers within a reasonable time after notice that the checks were dishonored, then the time of such payment will relate to the time of the receipt of the checks by the Comptroller.

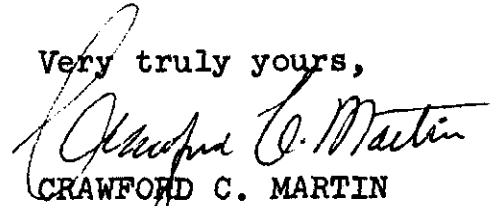
SUMMARY

Under Article 1.13 of Title 122A, Taxation-General, Vernon's Civil Statutes, no penalty should be assessed for late payment of taxes under circumstances where the taxpayer's return and check in payment of the taxes are timely filed with the Comptroller and where the taxpayer had sufficient funds in the drawee bank to pay the check but where the check was dishonored when presented for payment solely because the bank account, after receipt of the check, was suddenly frozen for a time due to internal difficulties in the bank which did not involve the taxpayer and over which he had no control, provided that the check is paid within a reasonable time after being dishonored or the taxpayer makes actual payment in money, either with or without use of the check, within a reasonable time after notification that the check has been dishonored. The fact question of whether such payment in money is made within

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a reasonable time must first be determined by the Comptroller and later by the courts in the event of a dispute between the taxpayer and the Comptroller.

Very truly yours,


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AW:dc

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